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|-------------------------|---|------------------------------|
| DARRELL RAY EDWARDS,    | ) | No. C 12-2504 LHK (PR)       |
|                         | ) |                              |
| Petitioner,             | ) | ORDER GRANTING               |
|                         | ) | RESPONDENT'S MOTION TO       |
| vs.                     | ) | DISMISS; DENYING CERTIFICATE |
|                         | ) | OF APPEALABILITY             |
| GARY SWARTHOUT, Warden, | ) |                              |
|                         | ) | (Docket Nos. 11, 14)         |
| Respondent.             | ) |                              |
|                         | ) |                              |

<sup>1</sup> In addition to the motion to address, Petitioner has filed a notice of default affidavit, two affidavits in support of the notice of default, and a memorandum in support of the notice of default affidavit. In these pleadings, most of the substance is not relevant to Respondent's motion to dismiss the petition as untimely. Petitioner's motion is denied.

1 **I. BACKGROUND**

2 In 1991, Petitioner pleaded guilty to second degree murder. (Mot. at 3.) On June 15,  
3 1994, Petitioner was sentenced to a term of 15-years to life in state prison. (Pet. at 2.) Petitioner  
4 did not file a direct appeal. On March 4, 2010, the Board found Petitioner unsuitable for parole  
5 for the fourth time. (Pet., Ex. 2 at 3.) Petitioner filed a state habeas petition in Superior Court,  
6 which was denied in 2011. (Pet. at 4.) Petitioner then filed unsuccessful habeas petitions in the  
7 California Court of Appeal and California Supreme Court. (*Id.* at 4-5.) Petitioner's underlying  
8 federal petition was file-stamped on May 16, 2012. In his petition, Petitioner claims that the  
9 Board's finding of unsuitability violated his 1991 plea agreement.

10 **II. DISCUSSION**

11 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") became law on  
12 April 24, 1996, and imposed for the first time a statute of limitations on petitions for a writ of  
13 habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-capital state  
14 convictions or sentences must be filed within one year of the latest of the date on which: (1) the  
15 judgment became final after the conclusion of direct review or the time passed for seeking direct  
16 review; (2) an impediment to filing an application created by unconstitutional state action was  
17 removed, if such action prevented petitioner from filing; (3) the constitutional right asserted was  
18 recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and  
19 made retroactive to cases on collateral review; or (4) the factual predicate of the claim could  
20 have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). Time  
21 during which a properly filed application for state post-conviction or other collateral review is  
22 pending is excluded from the one-year time limit. 28 U.S.C. § 2244(d)(2).

23 Under § 2244(d)(1)(D), the one-year limitation period starts on the date on which "the  
24 factual predicate of the claim or claims presented could have been discovered through the  
25 exercise of due diligence." The time begins "when the prisoner knows (or through diligence  
26 could discover) the important facts, not when the prisoner recognizes their legal significance."  
27 *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2000) (quoting *Owens v. Boyd*, 235 F.3d  
28 356, 359 (7th Cir. 2000)) (remanding case to district court for further factual findings concerning

1 determination of when, with exercise of due diligence, petitioner could have discovered facts to  
2 support prejudice prong of ineffective assistance of counsel claim). “Due diligence does not  
3 require the maximum feasible diligence, but it does require reasonable diligence in the  
4 circumstances.” *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012) (internal quotations and  
5 citations omitted).

6 Here, Petitioner asserts that the Board’s parole unsuitability determination violated the  
7 terms of his plea agreement, and as a result, he has been imprisoned beyond the agreed upon  
8 term. Petitioner concedes that the plea agreement stated he was to be sentenced to a term of  
9 fifteen years to life. However, he contends that there was a “side agreement” between the  
10 parties, wherein Petitioner understood that he would only be imprisoned for ten years, which  
11 would presumably be only seven years, taking into account prison credits. (Pet. Memo. at 5.)  
12 Assuming Petitioner’s allegations are true, the statute of limitations started running, at the latest,  
13 upon Petitioner’s completion of his anticipated 10 year sentence, i.e., in June 15, 2004. When  
14 June 15, 2004 passed and Petitioner was not released, Petitioner knew or should have known the  
15 factual predicate underlying his breach of plea claim. Thus, the limitations period started  
16 running on that date and expired one year later, in June 15, 2005 – approximately 7 years before  
17 Petitioner filed his petition challenging the breach of the plea agreement. Thus, the petition is  
18 untimely unless Petitioner can establish statutory or equitable tolling.

19 The one-year statute of limitations is tolled under § 2244(d)(2) for the “time during  
20 which a properly filed application for State post-conviction or other collateral review with  
21 respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). Here, there is no  
22 basis for statutory tolling because Petitioner’s first state habeas petition was not filed until 2011,  
23 approximately 6 years after the limitations period had already expired. *See Ferguson v.*  
24 *Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2244(d) does not permit the reinitiation  
25 of the limitations period that has ended before the state petition was filed,” even if the state  
26 petition was timely filed).

27 Petitioner also does not argue that he is entitled to equitable tolling. The Supreme Court  
28 has determined that Section 2244(d) is subject to equitable tolling in appropriate cases. *Holland*

1 *v. Florida*, 130 S.Ct. 2549, 2560 (2010). “[A] petitioner is entitled to equitable tolling only if he  
 2 shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary  
 3 circumstance stood in his way and prevented timely filing.” *Id.* at 2562 (internal quotation  
 4 marks omitted). Once a petitioner is notified that his petition is subject to dismissal based on  
 5 AEDPA’s statute of limitations and the record indicates that the petition falls outside the  
 6 one-year time period, the petitioner bears the burden of demonstrating that the limitation period  
 7 was sufficiently tolled under statutory or equitable principles. *See Smith v. Duncan*, 297 F.3d  
 8 809, 814 (9th Cir. 2002). Here, even though Petitioner was given notice that the petition was  
 9 subject to dismissal, and was provided an opportunity to respond, Petitioner failed to present any  
 10 viable argument as to why his petition should be considered timely. Thus, he has not met his  
 11 burden of demonstrating that he is entitled to equitable tolling.

12 Accordingly, the petition must be dismissed as untimely under 28 U.S.C. § 2244(d).<sup>2</sup>

### 13 **III. CONCLUSION**


14 Respondent’s motion to dismiss the petition is GRANTED. The instant petition is  
 15 DISMISSED. The Clerk shall terminate all pending motions and close the file.

### 16 **IV. CERTIFICATE OF APPEALABILITY**

17 For the reasons set out in the discussion above, Petitioner has not shown “that jurists of  
 18 reason would find it debatable whether the district court was correct in its procedural ruling.”  
 19 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a COA is DENIED.

20 **IT IS SO ORDERED.**

21 DATED: 5/11/13

  
 LUCY H. KOH  
 United States District Judge

27 \_\_\_\_\_  
 28 <sup>2</sup> Because the Court is dismissing the petition on timeliness grounds, it is unnecessary to  
 address Respondent’s alternative argument that the petition fails to state a claim for relief.